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## The Annotated Cordas

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# The Annotated Cordas

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## **Abstract**

Cordas v. Peerless Transportation Company appears as a principal case in at least two case-books on the of Torts, and as a note case in at least three others.

## ANNOTATOR'S PREAMBLE

Cordas v. Peerless Transportation Company<sup>3</sup> appears as a principal case in at least two casebooks on the law of Torts,<sup>4</sup> and as a note case in at least three others.<sup>5</sup> At least six law review articles have discussed the case and the legal principles for which it stands.<sup>6</sup> It figures in each of the

1. See Note, *The Common Law Origins of the Infield Fly Rule*, 123 U. PA. L. REV. 1474, n.1 (1975); see also Charles R. Maher, *The<sup>1</sup> \*2 Infernal Footnote<sup>3</sup>*, 70 A.B.A. J. 92 (Apr. 1984).

2. Cordas v. Peerless Transp. Co., 27 N.Y.S.2d 198 (City Ct. 1941).

\* Professor of Law, The Shepard Broad Law Center of Nova University. Michael Richmond received a A.B. from Hamilton College and a J.D. from Duke University. He would like to thank a great many people, but given the number of pages such a list would take, he fears that the editors of the esteemed journal in which this piece appears "would object to much." (They can find the source of this cite. The author is worn out from cite checking.) He will content himself with thanking the terrifyingly competent Head of Public Services of his library, Billie Jo Kaufman, for her outstanding and tireless work on this and other projects. He would also be remiss in not mentioning Steven Franzman, a practitioner in some upstate New York town or another, who many years ago, while a student of the author's, attempted to track down all the Shakespearean allusions in *Cordas*. Amazingly, he is the only student of the author's ever to seriously attempt this task. Unfortunately, the author has, over the years, lost track of the Franzman manuscript, and accordingly was forced to do all of his own research.

3. 27 N.Y.S.2d 198 (City Ct. 1941).

4. WILLIAM L. PROSSER ET AL., *CASES AND MATERIALS ON TORTS* 158 (8th ed. 1988); DIX W. NOEL & JERRY J. PHILLIPS, *CASES AND MATERIALS ON TORTS AND RELATED LAW* 73 (1980).

5. MARSHALL S. SHAPO, *TORT AND INJURY LAW* 445 (1980); GEORGE C. CHRISTIE & J. MEEKS, *CASES AND MATERIALS ON THE LAW OF TORTS* 122 (2d ed. 1990); MARSHALL FRANKLIN & ROBERT L. RABIN, *CASES AND MATERIALS ON TORT LAW AND ALTERNATIVES* 843 (5th ed. 1992).

6. W. Page Keeton, *Conditional Fault in the Law of Torts*, 72 HARV. L. REV. 401, 417 n.34 (1959); George Fletcher, *Fairness and Utility in Tort Theory*, 85 HARV. L. REV. 537, 552 (1972); Marshall S. Shapo, *A Representational Theory of Consumer Protection: Doctrine, Function and Legal Liability for Product Disappointment*, 60 VA. L. REV. 1109, 1283 (1974); Marshall Rudolph, *Judicial Humor: A Laughing Matter?*, 41 HASTINGS L.J. 175, 177 (1989); Walter M. Rogers, Note, "[I]t's All Right to Kill People, but Not Trees: Landowners of Environmentally Unsafe Properties Must be Held Strictly Liable for Personal Injuries Caused by Their Contaminated Land," 66 NOTRE DAME L. REV. 893, 935 (1991);



three leading treatises or hornbooks on Tort law.<sup>7</sup> But for all of the scholarly attention *Cordas* has drawn, only one case in fifty-one years has cited to it, and that not even from the same jurisdiction.<sup>8</sup>

As educators, we take our branch of the legal profession most seriously, extolling the virtues of our scholarly publications<sup>9</sup> at the drop of a tenure vote.<sup>10</sup> We point with faded pride to the aberrational article which has prompted some benighted courts to adopt a new legal theory.<sup>11</sup> The judicial cold shoulder accorded to *Cordas*, when taken in light of the prevalence of *Cordas* in our teaching materials and legal scholarship,<sup>12</sup> should give us pause and cause us to wonder at our relevance.<sup>13</sup>

CORDAS v. PEERLESS TRANSP. CO.  
City Court of New York, New York County  
April 3, 1941

Nicholas Athans and Hyman Muss, both of New York City, for plaintiff.

Louis L. Resnick and Harry P. Rich, both of New York City, for defendant.

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James D. Gordon III, *How Not to Succeed in Law School*, 100 YALE L.J. 1679, 1687 (1991); see also L.S. Tellier, Annotation, *Interference by One Riding in Automobile With Driver as a Factor in Determining Liability as between Driver and Others*, 4 A.L.R.2d 147, 149 (1949).

7. CLARENCE MORRIS & C. ROBERT MORRIS, MORRIS ON TORTS 41 (2d ed. 1980); N. PAGE KEETON ET AL., PROSSER & KEETON ON THE LAW OF TORTS § 33, at n.29 (5th ed. 1984); (But cf. David G. Owen, *The Fault Pit*, 26 GA. L. REV. 703, 703 n.1 (1992) (concerning the appropriate citation form)); 1 FOWLER V. HARPER ET AL., THE LAW OF TORTS § 1.22, at n.11 (2d ed. 1986).

8. Donaldson v. Manzella, 338 S.W.2d 78, 83 (Mo. 1960).

9. See, e.g., Charles Alan Wright, *How Many Catz Can Stand on the Head of a Pin, or Andrew Lloyd Webber, Where Are You Now That We Need You?*, 13 NOVA L. REV. 1 (1988).

10. See Michael L. Richmond & Robert M. Jarvis, *An Exemplar for Peer Evaluation*, 14 J. LEG. PROF. 21, 24 (1989).

11. E.g., Samuel Warren & Louis Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

12. Courts are not alone in scorning *Cordas*. The RESTATEMENT (SECOND) OF TORTS does not even use *Cordas* as an illustration.

13. Not.



1993]

*Richmond*CARLIN [Frank A.], Justice.<sup>14</sup>

This case presents the ordinary man<sup>15</sup>—the problem child of the law—in a most bizarre setting. As a lowly chauffeur in defendant's employ he became in a trice the protagonist in a breath-bating drama<sup>16</sup> with a denouement almost tragic. It appears that a man, whose identity it would be indelicate to divulge was feloniously relieved of his portable goods by two nondescript highwaymen in an alley near 26th Street and Third Avenue, Manhattan; they induced him to relinquish his possessions by a strong argument ad hominem couched in the convincing cant of the criminal and pressed at the point of a most persuasive pistol. Laden with their loot, but not thereby impeded, they took an abrupt departure<sup>17</sup> and he, shuffling off the coil<sup>18</sup> of that discretion which

14. Obituary, N.Y. TIMES, Dec. 11, 1954.

City Court Justice Frank A. Carlin died yesterday in his home, 360 West 55th Street, after an illness of several months. His age was 66. Justice Carlin was born in this city, attended Xavier High School and College and was graduated from Fordham Law School in 1914.

In World War I he served with the 606th United States Engineers. He taught at Public School 31, on West 44th Street, for three years before being elected Assemblyman from the 5th District in 1923. In the Assembly he supported labor and educational bills.

Justice Carlin served in the Assembly until 1930, when he was elected a Municipal Court Justice. He failed of election that year, but was elected the next.

He was a Democrat, but when he ran for re-election in 1949, he had Republican, Liberal, and Fusion Party support. His term would have expired Dec. 31, 1958.

In a typical decision in 1948, Justice Carlin ruled that persons who sold pinball machines on credit could not expect the New York courts to help collect for them.

He was a member of the American Legion, Knights of Columbus, the Elks, Ancient Order of Hibernians and the Peter J. Dooling Association. He also belonged to the New York County Lawyers Association and the Federal Bar Association.

15. "Methinks sometimes I have no more wit than a Christian or an ordinary man has: but I am a great eater of beef and believe that does harm to my wit." WILLIAM SHAKESPEARE, TWELFTH NIGHT act 1, sc. 3.

16. "All the world's a stage;/ And all the men and women merely players:/ They have their exits and their entrances;/ And one man in his time plays many parts:/ His acts being seven ages." WILLIAM SHAKESPEARE, AS YOU LIKE IT act 2, sc. 7.

17. "Stay, my Lord Talbot; for my lady craves/ To know the cause of your abrupt departure." WILLIAM SHAKESPEARE, KING HENRY VI act 2, sc. 3.

18. "For in that sleep of death what dreams may come/ When we have shuffled off this mortal coil/ Must give us pause . . . ." WILLIAM SHAKESPEARE, HAMLET act 3, sc. 1.



enmeshed him in the alley, quickly gave chase through 26th Street toward 2d Avenue, whither they were resorting "with expedition swift as thought"<sup>19</sup> for most obvious reasons. Somewhere on that thoroughfare of escape they indulged the stratagem of separation ostensibly to disconcert their pursuer and allay the ardor of his pursuit. He then centered on for capture the man with the pistol whom he saw board defendant's taxicab, which quickly veered south toward 25th Street on 2d Avenue where he saw the chauffeur jump out while the cab, still in motion, continued toward 24th Street; after the chauffeur relieved himself of the cumbersome burden of his fare the latter also is said to have similarly departed from the cab before it reached 24th Street. The chauffeur's story is substantially the same except that he states that his uninvited guest boarded the cab at 25th Street while it was at a standstill waiting for a less colorful fare; that his "passenger" immediately advised him "to stand not upon the order of his going but to go at once"<sup>20</sup> and added finality to his command by an appropriate gesture with a pistol addressed to his sacro iliac. The chauffeur in reluctant acquiescence proceeded about fifteen feet, when his hair, like unto the quills of the fretful porcupine,<sup>21</sup> was made to stand on end by the hue and cry of the man despoiled<sup>22</sup> accompanied by the clamorous concourse of the law-abiding which paced him as he ran; the concatenation of "stop thief," to which the patter of persistent feet did maddingly beat time, rang in his ears as the pursuing posse all the while gained on the receding cab with its quarry therein contained. The hold-up man sensing his insecurity suggested to the chauffeur that in the event there was the slightest lapse in obedience to his curt command that he, the chauffeur, would suffer the loss of his brains, a prospect as horrible to an humble chauffeur as it undoubtedly be to one of the intelligentsia. The chauffeur apprehensive of certain dissolution from either Scylla,<sup>23</sup>

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19. "But, with the motion of all elements,/ Courses as swift as thought in every power . . . ." WILLIAM SHAKESPEARE, LOVE'S LABOUR'S LOST act 4, sc. 3.

20. WILLIAM SHAKESPEARE, MACBETH act 3, sc. 4.

21. Hamlet's father's ghost, relating the story of his murder by Claudius, for effect urges Hamlet to make "Thy knotted and combined locks to part/ And each particular hair to stand on end,/ Like quills upon the fretful porpentine . . . ." WILLIAM SHAKESPEARE, HAMLET act 1, sc. 5.

22. "Hue and cry, villain, go! Assist me, knight. I am undone! Fly, run, hue and cry, villain! I am undone!" WILLIAM SHAKESPEARE, THE MERRY WIVES OF WINDSOR act 4, sc. 5.

23. One of two monsters who threatened ships passing through the Straits of Messina in ancient Greece. She sat upon an Italian rock barking like a dog and stretching her six heads out to pluck sailors from their ships. Ships steering away from her found themselves in danger of Charybdis. See *supra* note 21.



1993]

the pursuers, or Charybdis,<sup>24</sup> the pursued, quickly threw his car out of first speed in which he was proceeding, pulled on the emergency, jammed on his brakes and, although he thinks the motor was still running, swung open the door to his left and jumped out of his car. He confesses that the only act that smacked of intelligence was that by which he jammed the brakes in order to throw off balance the hold-up man who was half-standing and half-sitting with his pistol menacingly poised. Thus abandoning his car and passenger the chauffeur sped toward 26th Street and then turned to look; he saw the cab proceeding south toward 24th Street where it mounted the sidewalk. The plaintiff-mother and her two infant children were there injured by the cab which, at the time, appeared to be also minus its passenger who, it appears, was apprehended in the cellar of a local hospital where he was pointed out to a police officer by a remnant of the posse, hereinbefore mentioned. He did not appear at the trial. The three aforesaid plaintiffs and the husband-father sue the defendant for damages predicated their respective causes of action upon the contention that the chauffeur was negligent in abandoning the cab under the aforesaid circumstances. Fortunately the injuries sustained were comparatively slight. Negligence has been variously defined but the common legal acceptance is the failure to exercise that care and caution which a reasonable and prudent person ordinarily would exercise under like conditions or circumstances. It has been most authoritatively held that "negligence in the abstract, apart from things related, is surely not a tort, if indeed it is understandable at all." Cardozo, C.J., in *Palsgraf v. Long Island Railroad Co.*, 248 N.Y. 339, 345, 162 N.E. 99, 101, 59 A.L.R. 1253 [(1928)].<sup>25</sup> In

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24. The other monster. This one sat on the Greek side of the Straits, swallowing sea waters and regurgitating them so as to either suck ships under or swamp them from above. See *supra* note 20. Mythology to the side, Scylla and Charybdis were a genuine rock and whirlpool, and represented true hazards to the shipping of the time. Contemporary jargon would refer to being caught between "the rock and the hard place." Launcelot Gobbo, Shylock's clownish servant, tells Jessica: "Truly then I fear you are damned both by father and mother: thus when I shun Scylla, your father, I fall into Charybdis, your mother: well, you are gone both ways." WILLIAM SHAKESPEARE, *THE MERCHANT OF VENICE* act 3, sc. 5.

25. What lawyer can forget Helen Palsgraf's sad story? Yet in considering the actions of the two conductors who caused the parcel of fireworks to drop from the hands of the nameless passenger, Cardozo never decided their actions amounted to negligence. The ratio decidendi of the case focused on the lack of duty they owed to Mrs. Palsgraf at the outset. Thus, Cardozo did not address the issue of how a reasonably prudent person would have acted under the "exigent" circumstances of getting a tardy passenger aboard a moving train. Indeed, Cardozo may suggest he had doubts about finding them negligent in the emergency setting: "The conduct of the defendant's guard, if a wrong in its relation to the holder of the package, was not a wrong in its relation to the plaintiff, standing far away." 162 N.E. at 99



Steinbrenner v. M. W. Forney Co., 143 App. Div. 73, 127 N.Y.S. 620, 622 [(1911)]<sup>26</sup> it is said, "The test of actionable negligence is what reasonably prudent men<sup>27</sup> would have done under the same circumstances"; Connell v. New York Central & Hudson River Railroad Co., 144 App. Div. 664, 129 N.Y.S. 666, 669, [(1911)]<sup>28</sup> holds that actionable negligence must be predicated upon "a breach of duty to the plaintiff. Negligence is 'not absolute or intrinsic,' but 'is always relevant to some circumstances of time, place, or person.'" In slight paraphrase of the world's first bard<sup>29</sup> it may be truly observed that the expedition of the chauffeur's violent love of his own security outran the pauser, reason,<sup>30</sup> when he was suddenly confronted with unusual

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(emphasis added). See generally Michael L. Richmond, *The Development of Duty: Langridge to Palsgraf*, 31 ST. LOUIS U. L.J. 903, 945-52 (1987).

26. One street in a residential neighborhood was earmarked for urban renewal, and all the buildings stood vacant. The street itself was torn up and under construction, and the ends of the street were barricaded against vehicular traffic, although the barricades seemed not to extend across the sidewalks. The sidewalks were free of obstructions. The construction company did not place flares along the street. The plaintiff, a resident of the neighborhood, walked along the street under construction and at a point about 120 feet from the nearest streetlight attempted to cross. She fell into the construction excavation, suffered injuries, and sued the construction company. The court held there was no liability as the company owed her no duty.

27. Note the spurious case of *Fardell v. Potts*, in which the judge purportedly holds the trial court should have instructed the jury that "while there was evidence on which they might find that the defendant had not come up to the standard required of a reasonable man, her conduct was only what was to be expected of a woman, as such." A.P. Herbert, *Fardell v. Potts: The Reasonable Man*, in UNCOMMON LAW 4, 6 (1969). Less tongue-in-cheek cases have more recently held that there are instances in which the defendant must take into consideration the standard of the reasonable woman, particularly in cases involving sexual harassment. See, e.g., *Ellison v. Grady*, 924 F.2d 872, 875-76 (9th Cir. 1991).

28. A railroad yard had designated certain areas permitted to its employees. The plaintiff left these areas to urinate, and, while in a crossroads between train tracks, was struck and killed by a train. The engineer had not sounded his bell before entering the crossroads (as was required), but the employee was not actually in the crossroads. The court dismissed the action by the estate, holding the employer had no duty to provide a safe workplace other than in designated areas, and that the train engineer who failed to ring the bell owed no duty to the workman who was outside the crossroads.

29. Not really. The *Beowulf* master poet, who lived sometime in the early eighth century, would certainly question the chronology of Judge Carlin. Compared to him, Shakespeare was a Johnny-Come-Lately.

30. Macbeth has killed Duncan, and then slain Duncan's two guards under circumstances to make it appear that the guards had killed Duncan themselves. When questioned by Macduff why he had taken the lives of the two alleged criminals, Macbeth replies his love for his dead king overcame his ability to act rationally: "The expedition of my violent love/ Outrun the pauser, reason, which would refrain, / That had a heart to love, and in that



1993]

emergency which "took his reason prisoner."<sup>31</sup> The learned attorney for the plaintiffs concedes that the chauffeur acted in an emergency but claims a right to recovery upon the following proposition taken verbatim from his brief: "It is respectfully submitted that the value of the interests of the public at large to be immune from being injured by a dangerous instrumentality such as a car unattended while in motion is very superior to the right of a driver of a motor vehicle to abandon same while it is in motion even when acting under the belief that his life is in danger and by abandoning same he will save his life". To hold thus under the facts adduced herein would be tantamount to a repeal by implication of the primal law of nature written in indelible characters upon the fleshy tablets of sentient creation by the Almighty Law-giver, "the supernal Judge who sits on high."<sup>32</sup> There are those who stem the turbulent current<sup>33</sup> for bubble fame,<sup>34</sup> or who bridge the yawning chasm<sup>35</sup> with a leap for the leap's sake or who "outstare the sternest eyes that look, outbrave the heart most daring on the earth, pluck the young sucking cubs from the she-bear, yea, mock the lion when he roars for prey"<sup>36</sup> to win a fair lady and these are the admiration of the generality of men; but they are made of sterner stuff<sup>37</sup> than the ordinary man upon whom the law places no duty of emulation. The law would indeed be fond<sup>38</sup> if it imposed upon the ordinary man the

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heart/ Courage to make's love known?" WILLIAM SHAKESPEARE, *MACBETH* act 2, sc. 3.  
 31. After hearing the prophecy of the witches that their futures seemingly hold great promise, Banquo questioningly says to Macbeth, "Were such things here as we do speak about?/ Or have we eaten on the insane root/ That takes the reason prisoner?" WILLIAM SHAKESPEARE, *MACBETH* act 1, sc. 3.

32. "From that supernal judge, that stirs good thoughts/ In any breast of strong authority . . . ." WILLIAM SHAKESPEARE, *KING JOHN* act 2, sc. 1.

33. "Who once a day with his embossed froth/ The turbulent surge shall cover . . . ." WILLIAM SHAKESPEARE, *TIMON OF ATHENS* act 5, sc. 1.

34. "Then a soldier . . . Seeking the bubble reputation/ Even in the cannon's mouth." WILLIAM SHAKESPEARE, *AS YOU LIKE IT* act 2, sc. 7.

35. The end of *Moby Dick* leaves the sea alone and silent as the *Pequod* sinks beneath the waves. "Now small fowls flew screaming over the yet yawning gulf; a sullen white surf beat against its steep sides; then all collapsed, and the great shroud of the sea rolled on as it rolled five thousand years ago." HERMAN MELVILLE, *MOBY DICK* (1851).

36. WILLIAM SHAKESPEARE, *THE MERCHANT OF VENICE* act 2, sc. 1.

37. "When that the poor have cried, Caesar hath wept:/ Ambition should be made of sterner stuff . . . ." WILLIAM SHAKESPEARE, *JULIUS CAESAR* act 3, sc. 2. The quotation comes from Antony's noted funeral oration for Caesar ("Friends, Romans, Countrymen . . .").

38. Upon being told that "the law supposes that your wife acts under your direction," the law replies: "If the law supposes that . . . the law is a [sic] ass—a [sic] idiot. If that's the eye of the law, the law is a bachelor . . . ." CHARLES DICKENS, *OLIVER TWIST*



obligation to so demean himself when suddenly confronted with a danger, not of his creation, disregarding the likelihood that such a contingency may darken the intellect and palsy the will of the common legion of the earth,<sup>39</sup> the fraternity of ordinary men,<sup>40</sup>—whose acts or omissions under certain conditions or circumstances make the yardstick by which the law measures culpability or innocence [sic], negligence or care. If a person is placed in a sudden peril from which death might ensue, the law does not impel another to the rescue of the person endangered nor does it condemn him for his unmoral failure to rescue when he can;<sup>41</sup> this is in recognition of the immutable law written in frail flesh.<sup>42</sup> Returning to our chauffeur. If the philosophic Horatio and the martial companions of his watch were "distilled almost to jelly with the act of fear"<sup>43</sup> when they beheld "in the dead vast and middle of the night"<sup>44</sup> the disembodied spirit of Hamlet's father stalk majestically by "with a countenance more in sorrow than in anger"<sup>45</sup> was not the chauffeur, though unacquainted with the example of these eminent men-at-arms, more amply justified in his fearsome reactions when he was more palpably confronted by a thing of flesh and blood<sup>46</sup> bearing in its hand an engine of destruction which depended for its lethal purpose upon the quiver of a hair? When Macbeth was cross-examined by Macduff as to any reason he would advance for his sudden despatch of Duncan's grooms he said in plausible answer "Who can be wise, amazed, temperate and furious, loyal and neutral, in a moment? No man."<sup>47</sup> Macbeth did not by a "tricky word"<sup>48</sup> thereby stand justified

(1838).

39. "To the legion of the lost ones, to the cohort of the damned." RUDYARD KIPLING, *GENTLEMEN-RANKERS*, stanza 1.

40. "These couchings and these lowly courtesies/ Might fire the blood of ordinary men . . . ." WILLIAM SHAKESPEARE, *JULIUS CAESAR* act 3, sc. 1. Kent describes his qualities to King Lear as follows: "[T]hat which ordinary men are fit for, I am qualified in; and the best of me is diligence." WILLIAM SHAKESPEARE, *KING LEAR* act 1, sc. 4. Lear later rejects the loyal Kent's sound advice. Shakespeare frowns on that attitude which scorns ordinary men—Caesar and Lear both meet tragic denouements.

41. See, e.g., *Yania v. Bigan*, 155 A.2d 343 (Pa. 1959). (Bigan taunted Yania into jumping into a water-filled trench, and made no effort to rescue him when Yania drowned. The court held Bigan was not liable.)

42. "[T]he spirit indeed is willing, but the flesh is weak." *Matthew* 26:41 (King James).

43. WILLIAM SHAKESPEARE, *HAMLET* act 1, sc. 2.

44. *Id.*

45. *Id.*

46. "Sweet lords, sweet lovers, O! let us embrace./ As true we are as flesh and blood can be . . . ." WILLIAM SHAKESPEARE, *LOVE'S LABOUR'S LOST* act 4, sc. 3.

47. WILLIAM SHAKESPEARE, *MACBETH* act 2, sc. 3.

48. WILLIAM SHAKESPEARE, *THE MERCHANT OF VENICE* act 3, sc. 5.



1993]

as he criminally created the emergency from which he sought escape by indulgence in added felonies to divert suspicion to the innocent. However, his words may be wrested to the advantage of the defendant's chauffeur whose acts cannot be legally construed as the proximate cause of plaintiff's injuries, however regrettable, unless nature's first law<sup>49</sup> is arbitrarily disregarded. Plaintiff's attorney in his brief cites the cases of *Grunfelder v. Brooklyn Heights Railroad Co.*, 143 App. Div. 89, 127 N.Y.S. 1085 [(1911)],<sup>50</sup> and *Savage v. Joseph H. Bauland Co.*, 42 App. Div. 285, 58 N.Y.S. 1014 [(1899)],<sup>51</sup> as authorities for a contrary holding. Neither case is apposite in fact or in principle. In the classic case of *Laidlaw v. Sage*, 158 N.Y. 73, 89, 90, 52 N.E. 679, 685, 44 L.R.A. 216 [(1899)],<sup>52</sup> is found a statement of the law peculiarly apropos: "That the duties and responsibilities of a person confronted with such a danger are different and unlike those which follow his actions in performing the ordinary duties of life under other conditions is a well-established principle of law. \* \* \* 'The law presumes that an act or omission done or neglected under the influence of pressing danger was done or neglected involuntarily.' It is there said that this rule seems to be founded upon the maxim that self-preservation is the

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49. Cf. "I died whilst in the womb he stay'd/ Attending nature's law." WILLIAM SHAKESPEARE, *CYMBELINE* act 5, sc. 4.

50. The engineer of a streetcar, seeing an obstruction in its path, jumped from the car rather than attempting to stop. The evidence demonstrated he could have avoided the accident by remaining at his post. A passenger jumped from the car as well, and was injured. The streetcar company defended the suit by arguing that the passenger was contributorily negligent. The court expressly held the emergency doctrine did not apply as the engineer could have stopped the car without injury. It also held that the passenger, having seen the engineer jump, could not be deemed contributorily negligent in following suit. The passenger was not held to the same degree of knowledge of the ability of the car to stop as was the engineer.

51. An elevator car had fallen, but was at a standstill. The passengers were frightened, and the defendant in attempting to repair the car rapidly, caused it to fall still further. The court held that the defendant could not use the emergency doctrine to protect his actions as the emergency had passed once the car had stopped and the passengers were in a position of stability and safety, despite their fright.

52. In this bizarre case, a stranger holding a carpet bag presented a note to the defendant while in the defendant's office. The note stated that the bag contained dynamite, and if the defendant did not pay him \$1.2 million, the stranger would drop the bag. The plaintiff was standing nearby the defendant, who told the stranger he had no intention of meeting the stranger's demands. The plaintiff then testified that the defendant took him by the arm and used his body as a shield. The defendant denied this, and the physical evidence tended to contradict it as well. The stranger then dropped the bag, causing an explosion in which the plaintiff suffered severe injuries. The New York Court of Appeals reversed a judgment for the plaintiff, but primarily on grounds that the acts of the stranger, rather than those of the defendant, caused the plaintiff's injuries.



first law of nature, and that, where it is a question whether one of two men shall suffer, each is justified in doing the best he can for himself." (Italics ours.) *Kolanka v. Erie Railroad Co.*, 215 App. Div. 82, 86, 212 N.Y.S. 714, 717 [(1925)],<sup>53</sup> says: "The law in this state does not hold one in an emergency to the exercise of that mature judgment required of him under circumstances where he has an opportunity for deliberate action. He is not required to exercise unerring judgment, which would be expected of him, were he not confronted with an emergency requiring prompt action." The circumstances provide the foil by which the act is brought into relief to determine whether it is or is not negligent. If under normal circumstances an act is done which might be considered negligent it does not follow as a corollary that a similar act is negligent if performed by a person acting under an emergency, not of his own making, in which he suddenly is faced with a patent danger with a moment left to adopt a means of extrication. The chauffeur—the ordinary man in this case—acted in a split second in a most harrowing experience. To call him negligent would be to brand him coward; the court does not do so in spite of what those swaggering heroes, "whose valor plucks dead lions by the beard",<sup>54</sup> may bluster to the contrary. The court is loathe to see the plaintiffs go without recovery even though their damages were slight, but cannot hold the defendant liable upon the facts adduced at the trial. Motions, upon which decision was reserved, to dismiss the complaint are granted with exceptions to plaintiffs. Judgment for defendant against plaintiffs dismissing their complaint upon the merits. Ten days' stay and thirty days to make a case.<sup>55</sup>

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53. The plaintiff, a passenger in a truck stalled on railroad tracks, saw an oncoming train. Unfamiliar with vehicular travel, the plaintiff failed to get out of the truck in time to avoid the accident. Had plaintiff acted promptly and decisively, he could have escaped harm, but due to his state of excitement he did not. In his suit, the trial judge directed a verdict for the defendant on the issue of contributory negligence. The appellate court reversed, holding that under the emergency setting the question of the plaintiff's negligence should have gone to the jury.

54. WILLIAM SHAKESPEARE, *KING JOHN* act 2, sc. 1.

55. *Cordas v. Peerless Transp. Co.*, 27 N.Y.S.2d 198 (City Ct. 1941). "The rest is silence." WILLIAM SHAKESPEARE, *HAMLET* act 5, sc. 2.





EXCERPTS

FROM:

# CORPUS JURIS HUMOROUS

*A Compilation Of*

HUMOROUS, EXTRAORDINARY, OUTRAGEOUS, UNUSUAL, COLORFUL,  
INFAMOUS, CLEVER AND WITTY REPORTED JUDICIAL OPINIONS AND  
RELATED MATERIALS DATING FROM 1256 A.D. TO THE PRESENT

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